Supreme Court, U.S.
FILED
JUL 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1972

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1986

NATIONAL FOOTBALL LEAGUE, et al.,
*Petitioners,*

VS.

OAKLAND RAIDERS, LTD., AND LOS ANGELES MEMORIAL COLISEUM COMMISSION,
*Respondents.*

## BRIEF OF RESPONDENT LOS ANGELES RAIDERS (FORMERLY "OAKLAND RAIDERS") IN OPPOSITION TO PETITION OF NATIONAL FOOTBALL LEAGUE, et al., FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS


Page

I. The Sole Purpose of the Petition Is To Obtain a Rehearing of Denial of Certiorari by this Court in November 1984 of a Decision of the Court Below of February 1984 ..... 2

II. Moreover, Even if it Were Open to Petitioners To Seek Certiorari Again, After Denial in 1984, the Petition Has No Merit ..... 6

Petitioners' Second Question ..... 10

Conclusion ..... 11

## TABLE OF AUTHORITIES

### Cases

Page

*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) ..... 10

*Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) ..... 6

Gondeck v. Pan American World Airways, 382 U.S. 25 (1965) ..... 6n.

*Los Angeles Memorial Coliseum v. National v. National Football League*, 791 F.2d 1356 (9 Cir. 1986) ..... 2

*Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9 Cir.), *cert. denied*, 469 U.S. 990 (1984) ..... 2

*Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (1980) ..... 3n.

*National Bancard Corp. (NaBANCO) v. VISA U.S.A., Inc.*, 779 F.2d 592 (11 Cir. 1986)) ..... 9

*NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) ..... 9-10

*North American Soccer League v. National Football League*, 670 F.2d 1249 (2 Cir.), *cert. denied*, 459 U.S. 1074 (1982) ..... 8, 10

*Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) ..... 7, 10

*Radovich v. National Football League*, 352 U.S. 445 (1957) 8

*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 93 L.Ed.2d 834 (1987) ..... 7

*Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) ..... 10, 11

*United States v. Sealy, Inc.* 388 U.S. 350 (1967) ..... 7

*United States v. Topco Associates*, 405 U.S. 596 (1972) ... 7

*Weed v. Bilbrey*, 400 U.S. 982 (1970) ..... 6n.

## TABLE OF AUTHORITIES

### CASES

Page

**Statutes and Rules**

Federal Rules of Civil Procedure:
Rule 42(a) ..... 3, 4
Rule 42(b) ..... 3, 4
Rule 54(b) ..... 4

United States Supreme Court Rules:
Rule 21(e) ..... 2
Rule 51 ..... 5
Rule 51.2 ..... 2

15 U.S.C. § 1 ..... 3, 5n.

**Other Authorities**

Bork "Ancillary Restraints and the Sherman Act", 15 ABA Antitrust Law Journal, pp. 211,212 (1959) ..... 7

*Restatement (Second) of Contracts,* § 188 (1981) ..... 7, 8

Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed., 1986), pp. 619-623 ..... 5-6

9 Wright & Miller, *Federal Practice and Procedure,* § 2390 (1971) ..... 4

10 Wright & Miller, *Federal Practice and Procedure,* § 2661 (1983) ..... 4

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[1] "Los Angeles Raiders" is the present name of what was formerly called "Oakland Raiders". In 1982, following the decision of the district court, Raiders was allowed by the National Football League to move to Los Angeles and has since conducted itself as the Los Angeles Raiders.

It is a limited partnership. Allen Davis is the sole general partner, and the limited partners are Andrews Construction Co., Lou Barroero, Arnold Boscacci, Eugene Boscacci, John Brooks, Julius N. Hartman, E. J. McGah, Gladys Sargent, Ralph J. Vail, Wilfred Winkenbach. Former limited partners Sheldon Milenbach, Henry Trione, and Frank Ivaldi may have an interest in the outcome. No one else has.

## I

## The Sole Purpose of the Petition is to Obtain a Rehearing of Denial of Certiorari by this Court in November 1984 of a Decision of the Court Below of February 1984

The petition is not candid with the Court. In response to the requirement of a statement of the "date of the judgment or decree sought to be reviewed, and the time of its entry" and the "date of any order respecting a rehearing" (Rule 21(e)), the petition (p. 2) suavely states the date of the decision as June 16, 1986, with rehearing denied on March 12, 1987. But this is the decision reported at 791 F.2d 1356, *and the present petition contains not a single word seeking review by this Court of anything there decided; no issue stated in the petition's "Questions Presented"* is presented in that decision at all.

The petition states (p. 1) that it seeks a writ to review the "judgment*s*" (plural) of the court below in two cases, No. 82-5572[2] and No. 83-5907. The judgment in 83-5907 is the judgment of June 16, 1986, and the petition does not seek review of anything in it. All it seeks to review is the decision in No. 82-5572, and that case was decided more than three years ago, on February 28, 1984, rehearing denied on June 19, 1984, reported at 726 F.2d 1381. *Thereupon National Football League ("NFL") and its members petitioned this Court for a writ of certiorari to review that decision,* and this Court *denied the petition* on November 5, 1984, *National Football League, et al., Petitioners v. Oakland Raiders, Ltd., et al.*, 469 U.S. 990. All the issues discussed in the present petition for certiorari were fully discussed in NFL's petition in 1984.

In short, the entire purpose of the present petition is to seek the very review that this Court had already denied in 1984, and it does so under the guise of a timely petition for certiorari from the decision of 1986, no part of which it assails. If NFL and its member clubs had not petitioned in 1984 to review the 1984 decision, under the Court's Rule 51.2 it would be 2½ years too

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[2] The petition reads "83-5572", but that is a typographical error. The correct number is 82-5572.

late to do so now. Petitioners should not escape this lapse of time by the device of stating that they petition from the 1986 decision of which they do not seek review.

Petitioners (at p. 2) incorrectly denominate the 1984 decision of the court below as on an appeal from an "interlocutory" injunction. But the judgment appealed from was not interlocutory; it was final.[3] It was rendered after trial; it not only granted an injunction; it first declared defendants' conduct to be an unlawful violation of the Sherman Act and on that basis enjoined continuance of the conduct. The relevant facts are quickly stated. Los Angeles Memorial Coliseum Commission sued NFL and its members for violating Sherman Act § 1, by preventing the Coliseum from having any member club play in its stadium as a tenant. In early 1980, Oakland Raiders, one of the defendants, cross-complained against NFL and its other members for violating the Sherman Act in preventing the Raiders from moving to and playing home games in Los Angeles.

Under F.R.Civ.P. Rules 42(a) and (b), the trial was bifurcated, with a first trial to determine violation and liability and, if violation and liability were found, a second trial to determine amount of damages. NFL appellants contested liability on the basis that they were a "single entity", incapable of conspiring with "itself", and also that they committed no restraint of trade in preventing Raiders from moving to Los Angeles and that the restraint was in any event not unreasonable under the Rule of Reason.

In 1982 a jury verdict found that there was an unreasonable restraint of trade, and in June 1982 the district court entered a judgment against NFL defendants, both declaratory and injunctive, entitled Final Decree. It is set forth as Appendix H, Pet. p. 126a. This Final Decree contained the following provisions:

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[3] An interlocutory injunction had been obtained by Los Angeles Memorial Coliseum Commission, not by Raiders, in early 1980 (set forth in Petition Appendix G), but was reversed and vacated in 1980, *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (Dec. 1980).

"The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2).

"NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

"1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

"2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

* * *

"4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered."

The provision of paragraph 4, just quoted, was a determination under F.R.Civ.P. Rule 54(b). F.R.Civ.P. Rules 42(a) and (b) and 54(b) exist to facilitate an efficient administration of justice. To that end Rules 42(a) and (b) permit severance for trial of separate issues. As said in 9 Wright & Miller, *Federal Practice & Procedure*, § 2390, p. 296, "Separation of issues of liability from those relating to damages is an obvious use for Rule 42(b)". To the same end of efficiency of administration of justice, Rule 54(b) allows a trial court to confer finality on the outcome of a separate trial under Rule 42(b), thus makes it immediately appealable, and thereby confers finality on an affirmance of that judgment on appeal. A major consequence is a *res judicata*. 10 Wright & Miller, § 2661, p. 128. The decision of the court below in 1984, to which this Court then denied review, was affirmance of

a final judgment and itself became immune from attack when this Court denied certiorari in November 1984.[4]

Not only did NFL and its members not petition for a rehearing after denial of their petition for certiorari within the time required by this Court's Rule 51, they have never applied for a rehearing at all.

While the appeal from the Final Decree of liability was pending, the bifurcated issue of amount of damages went to trial before a jury, a judgment was entered in favor of Raiders for damages upon the verdict, and an appeal from the damages judgment was taken by NFL and its other members to the court below, and was briefed, argued, and submitted. Then, on October 15, 1984, the Court of Appeals, having been informed of the petition of the NFL appellants for certiorari addressed to its decision on liability of February 1984, withdrew submission of the damages appeal "pending a decision of the United States Supreme Court on the petition for writ of certiorari filed by appellants". Not until after this Court denied certiorari on November 5, 1984, did the Court of Appeals resume consideration of the damages appeal upon the completely justified assumption that issues of liability were then *finally* adjudicated.

The present petition does not even advert to the question of this Court's power to grant certiorari to the 1984 decision after this long delay and previous denial; much less does it comply with any of the other requirements of Rule 51. There has been less than a handful of cases where a petition for rehearing after denial of certiorari has been granted after lapse of the usual time, and these in only truly extraordinary circumstances. (*Cf.* Stern, Gressman,

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[4] The notice of appeal stated that the appeal was taken from the injunction. Raiders filed a motion to dismiss or affirm on the ground that no appeal had been taken from the remainder of the Final Decree, particularly the declaration of illegality, and that therefore it was not open to appellants to contend that their prevention of the Raiders from transferring to Los Angeles did not violate § 1 of the Sherman Act. The motion to dismiss was denied after NFL's response that, under rules of proper construction, the notice was an appeal from all portions of the final judgment.

and Shapiro, *Supreme Court Practice* (6th ed., 1986) at pp. 619-623.) But there is not a single word in the petition even proffered to justify asking this Court to review now what it had declined to review nearly three years ago.[5] We submit that the guiding principle was succinctly stated for the Court by Justice (now Chief Justice) Rehnquist in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

The petition suggests that there have been intervening decisions contrary to that of the 1984 decision. As we note below, there have been none.

## II

## MOREOVER, EVEN IF IT WERE OPEN TO PETITIONERS TO SEEK CERTIORARI AGAIN, AFTER DENIAL IN 1984, THE PETITION HAS NO MERIT

The petition proffers three questions (p. i). The third relates solely to respondent Los Angeles Memorial Coliseum Commission. The second is not in the case, as we note on page 10 below.

Relative to the first question, the arguments made in the present petition for certiorari are those made in NFL's 1984 petition, No. 84-406 in this Court, and they were all answered in the "Brief of Respondent Los Angeles Raiders (formerly 'Oakland Raiders') in Opposition to Petition of National Football League for Writ of Certiorari" filed in October 1984. We need not

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[5] Compare the dissent of Justice Douglas in *Weed v. Bilbrey*, 400 U.S. 982 (1970), from a denial of a petition for rehearing of a denial of certiorari with the dissent of Justice Harlan from the grant of a similar petition in *Gondeck v. Pan American World Airways*, 382 U.S. 25 (1965) and Justice Harlan's warning (at p. 31) that the grant in that case "holds seeds of mischief for the future orderly administration of justice."

repeat our presentation in that opposition. A quick summary is enough.

Both petitions rest on dilation about the individualities of professional football and how it differs from other businesses. Those individualities served their fullest possible function by getting the case to the jury on the Rule of Reason standard, which was how the case was handled both in the trial court and the Court of Appeals. And this was done, although ordinarily allocation of territories is illegal *per se*, and this case concerns NFL rules about territorial exclusivity, division and allocation of territory, regional protection of each club from competition, preservation of monopolistic satrapies.

Petitioners' principal post-1984 citation is *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). But all that this Court there held was that it was error to apply a *per se* standard, and it remanded for a Rule of Reason determination. The present case was decided on a Rule of Reason basis. NFL's obsession with this irrelevant *per se* question (*e.g.*, at p. 2) is particularly extreme in its contention (p. 15) that the Court's decisions in *United States v. Topco Associates,* 405 U.S. 596 (1972) and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) have been "effectively overruled". This aims at a target nonexistent in this case. It will be time enough to hold an autopsy on *Topco* and *Sealy* if and when a case arises that was decided on a *per se* basis.

The present petition tracks the 1984 petition in expatiation about the doctrine of "ancillary restraints", citing, among others, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), the facts of which have no similarity to those of the present case. It suffices to say that the function of ancillarity in antitrust analysis is merely to remove, in some instances, the *per se* label from restraints otherwise illegal *per se* and to permit them to be judged by Rule of Reason treatment, as explained by Judge Bork (then Professor Bork) in "Ancillary Restraints and the Sherman Act", 15 ABA Antitrust Law Journal, pp. 211, 212 (1959). So also *Restatement (Second) of Contracts,* § 188 (1981). And here, we note again, the case was determined on Rule of Reason basis after granting to the doctrine of ancillarity

its full scope (1984 decision, Pet., App. D, p. 74a *et seq.*). The Court of Appeals discussed and relied on Professor Bork's explanation of the law.

Moreover, the court's jury instructions gave NFL more favorable treatment that the ancillary restraint doctrine would accord it. As the Restatement, § 188(1)(a) and comment (d) teaches, the ancillary restraint rule does not permit a "restraint . . . greater than is needed to protect the promisee's legitimate interest"; the restraint must be the *least* restrictive *necessary* to achieve the legitimate end. Here, by contrast, the jury was instructed that the fact, if it were a fact, that "Rule 4.3 imposes a restraint broader than reasonably necessary to achieve its purpose" was only one factor, and that the jury was to consider "whether Rule 4.3 was fairly necessary in the circumstances of the case or whether it exceeded the outer limits of restraint reasonably necessary to protect the defendants' legitimate purpose" (Tr.2d 7218). Rule 4.3 could pass this test even though it was not the least restrictive alternative. In *North American Soccer v. National Football League*, 670 F.2d 1249 (2 Cir. 1982), the Second Circuit imposed the stricter standard that if a less restrictive alternative is available the use of the more restrictive is unreasonable. This Court denied certiorari, 459 U.S. 1074 (1982). Justice (now Chief Justice) Rehnquist dissented from the denial because, *inter alia*, he disagreed that availability of a less restrictive alternative was decisive and believed "that the possibility of less restrictive alternatives is only one among many proper considerations for the factfinder" (459 U.S. at 1080). In the present case precisely that more relaxed standard was given to the jury.

In our brief in opposition to the 1984 petition, we said that the gist of NFL's argument was not to counter any argument that its conduct was *per se* unlawful but to assert that it was *per se* lawful. Its present petition makes that explicit (p. 14). In short, the Court is being asked to hold that NFL and its members are *immune* from the antitrust law with respect to territorial allocations and monopolies, the precise immunity NFL has unsuccessfully sought from Congress year-after-year for thirty years, ever since the Court, in *Radovich v. National Football League*, 352

U.S. 445 (1957), disabused NFL of the notion that football shares the antitrust immunity of baseball. A full history of those efforts through 1984 is set forth at pp. 24-27 of Raiders' brief in opposition to the 1984 petition for certiorari.

The gist of the matter is that petitioners are asking the Court to do what only Congress can do and has steadfastly refused to do. Petitioners' citation (at p. 14) of testimony by Mr. Rule, Acting Assistant Attorney General, Antitrust Division, before the Senate Judiciary Committee in 1985 (set forth at length in Appendix I, Pet. p. 129a, *et seq.*) is a dead giveaway. Mr. Rule was expressing the view of the present administration of the antitrust division that Congress should enact some sort of "limited immunity" to professional sports with respect to team locations (*see, e.g.*, Pet. p. 139a) but avoided defining the contours the immunity should take. One can differ from the Division's view of desirable legislation, but the forum in which to debate NFL's persistent request for immunity from the Sherman Act is Congress, not the courts.

NFL's 1984 petition dressed up its claim of *per se* lawfulness in the garb of a contention that NFL and its 28 members constitute a "single entity", incapable of conspiring with itself. That contention is so baseless that Mr. Rule in his testimony before the Senate Judiciary Committee dismissed it out of hand (Pet., App. I, p. 133a). Consequently, following its custom of 30 years of rephrasing the same argument in phraseology in fashion at a particular moment, NFL and its member appellants now rephrase the wording "single entity" to read "intra-enterprise agreement", and in that context fall back upon the term "joint venture". But the sketchiest history tells one that the very target of the Sherman Act was John D. Rockefeller's notion of the efficiencies of "intra-enterprise agreements", whence the "trust." The petition (p. 9) asserts that the term "joint venture" is, "for antitrust purposes", "synonymous with 'partnership' ", and cites *National Bancard Corp. (NaBANCO) v. VISA, U.S.A., Inc.*, 779 F.2d 592 (11 Cir. 1986), one of its few post-1984 citations, as so holding. Neither that nor any other case does so; what *NaBANCO* said is that a partnership is the "best example" of a lawful joint venture (p. 601). NFL and its members lacked the necessary essentials to be a partnership. (1984 decision, Pet., App. D, p. 63a.) In *NCAA v.*

*Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984), this Court remarked that "joint ventures have no immunity from the antitrust laws". The term "joint venture" is merely a generality for some kind of concerted activity, and concerted activity is the very core of the antitrust law. The *nature* of a particular joint venture may enter into determination of "reasonableness", but the *fact* of a joint venture does not immunize concerted action from Rule of Reason analysis. Mr. Rule in his testimony before the Senate Committee concurred in that truism (Pet., p. 134a).

Repeating what petitioner did in the 1984 petition, they invoke *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). But *Copperweld* related solely to a parent corporation and "its wholly-owned subsidiary". Here, members of the NFL are not subsidiaries in whole or any part of NFL, nor do they occupy any ownership relation one to another. The sole relationship is the contractual one, and contracts are precisely the very essence of what the Sherman Act targets for analysis.

As petitioners did in their 1984 petition, they again refer to Justice (now Chief Justice) Rehnquist's dissent from denial of certiorari in *National Football League v. North American Soccer League*, supra, 459 U.S. 1074, but Justice Rehnquist did not dissent from the denial in 1984 of certiorari here. His dissent in the *Soccer* case drew a distinction between a situation where an assailed rule is aimed by one sports league at a competing sports league and a situation where the rule impedes competition within the NFL itself, pointing to two teams in Los Angeles as an example, precisely the present case.

*Petitioners' Second Question:*

Petitioner's second "question" (p. i, 16-23) is not in the case and never was. Petitioners grasp at *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). That case held that outside of the confines of a possible statutory immunity from the Sherman Act such as was involved in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), lack of procedural safeguards does not impose a *per se* standard of illegality or deprive an accused of the right to a Rule of Reason analysis. The case is not pertinent, not only because the 1984

decision was based on a Rule of Reason determination, but also because *no question of procedural safeguards or defects* entered into that decision at all. NFL's brief of 75 pages in the court below on the liability issue did not refer to the subject, and it claimed no error about instructions given or refused on the subject. Similarly, Raiders' 70 page brief on the liability appeal said nothing about procedural defects or safeguards. In the long 1984 opinion of the court below (occupying 50 pages in an appendix to the petition, pp. 52a-103a), the only reference to procedural mechanisms or to *Silver* is in a brief paragraph on page 79a which is no part of the reasoning on which the Court based its decision. It is merely a suggestion of how sports leagues might cautiously act thereafter—"[s]ome sort of procedural mechanisms . . . *may* also be necessary . . . ". [Emphasis added]

## CONCLUSION

The petition is a long-delayed attempt to obtain reconsideration of denial of certiorari in 1984 and is not properly before the Court. It is, moreover, without merit. We respectfully submit that it should be denied.

Concurrently, by petition filed in this Court on June 9, 1987, *Los Angeles Raiders v. National Football League, et al.*, No. 86-1968, Los Angeles Raiders seeks certiorari to review the current decision of the court below relative to *damages*, and we submit that it should be granted.

DATED: San Francisco, California, July 7, 1987

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